

HOUSE BILL REPORT

E2SHB 1691

As Passed Legislature

Title: An act relating to financial responsibility requirements related to oil spills.

Brief Description: Concerning financial responsibility requirements related to oil spills.

Sponsors: House Committee on Appropriations (originally sponsored by Representatives Gregerson, Lekanoff, Fitzgibbon, Ramel, Sells, Bateman, Duerr, Valdez, Davis, Fey, Macri, Peterson, Senn, Simmons, Pollet and Kloba).

Brief History:

Committee Activity:

Environment & Energy: 1/13/22, 1/21/22 [DPS];
Appropriations: 1/31/22, 2/3/22 [DP2S(w/o sub ENVI)].

Floor Activity:

Passed House: 2/11/22, 83-15.
Senate Amended.
Passed Senate: 3/3/22, 48-0.
House Concurred.
Passed House: 3/8/22, 84-13.
Passed Legislature.

Brief Summary of Engrossed Second Substitute Bill

- Requires the owners or operators of facilities and vessels subject to financial responsibility demonstration requirements to obtain a certificate of financial responsibility (COFR) from the Department of Ecology (Ecology), and provides that COFRs may not have a term greater than two years and are conclusive evidence that the COFR holder is the party responsible for a vessel or facility for purposes of determining liability under state water pollution laws.
- Adds federally recognized Indian tribes to the list of entities that owners or operators of stationary oil facilities must be able to compensate in the

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event of a reasonable worst-case oil spill, in order to demonstrate required financial responsibility to Ecology.

- Requires Ecology rules related to vessel and facility demonstrations of financial responsibility through self-insurance to meet certain standards, and adds certificates of deposit, letters of credit, and protection and indemnity club membership as acceptable options for vessels and facilities to demonstrate financial responsibility to Ecology.

HOUSE COMMITTEE ON ENVIRONMENT & ENERGY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Fitzgibbon, Chair; Duerr, Vice Chair; Dye, Ranking Minority Member; Klicker, Assistant Ranking Minority Member; Berry, Fey, Goehner, Harris-Talley, Ramel, Shewmake and Slatter.

Minority Report: Without recommendation. Signed by 2 members: Representatives Abbarno and Boehnke.

Staff: Jacob Lipson (786-7196).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Environment & Energy. Signed by 24 members: Representatives Ormsby, Chair; Bergquist, Vice Chair; Gregerson, Vice Chair; Macri, Vice Chair; MacEwen, Assistant Ranking Minority Member; Chopp, Cody, Dolan, Dye, Fitzgibbon, Frame, Hansen, Johnson, J., Lekanoff, Pollet, Rude, Ryu, Schmick, Senn, Springer, Steele, Stonier, Sullivan and Tharinger.

Minority Report: Do not pass. Signed by 7 members: Representatives Stokesbary, Ranking Minority Member; Chambers, Assistant Ranking Minority Member; Boehnke, Chandler, Harris, Hoff and Jacobsen.

Minority Report: Without recommendation. Signed by 1 member: Representative Corry, Assistant Ranking Minority Member.

Staff: Dan Jones (786-7118).

Background:

Oil Spill Contingency Planning Requirements and Spill Penalties.

The Department of Ecology (Ecology) administers an oil spill preparedness, prevention, and

response program. Among other laws implemented by Ecology's oil spills program, operators of vessels and facilities, including oil refineries, terminals, pipelines, and railroads that are involved in the bulk transfer of oil, must put in place oil spill contingency plans that outline containment and remediation responses to potential oil spills. The contingency plans of facilities and vessels must be designed to be capable of removing oil and minimizing damage to the environment from a worst-case spill of oil. For facilities, a worst-case spill is defined as the largest foreseeable spill into state waters from the facility in adverse weather conditions; for vessels, a worst-case spill is a spill of the entire cargo and fuel of the vessel in adverse weather conditions.

Under state water pollution control laws, oil spills in state waters are subject to civil penalties of up to \$10,000 per day per violation, plus additional criminal penalties for willful violations. Parties responsible for oil spills must also pay natural resource damages associated with the spill according to either a prescribed schedule or based on an assessment of the damages to natural resources. Beyond environmental penalties and natural resource damages, strict liability is established for damages to public or private property due to oil spills, including loss of income, the means of producing revenue, or economic benefits resulting from an injury due to loss of real property or natural resources.

Financial Assurance Requirements for Facilities and Vessels.

Facilities such as oil refineries and terminals must demonstrate to Ecology the financial ability to compensate the state and local governments for damages from a reasonable worst-case spill. In calculating this amount, Ecology is directed to consider matters including the amount of oil that could be spilled from the facility into navigable waters, the frequency of facility operations, the damages that could result from the spill, and the commercial availability and affordability of financial responsibility.

Likewise, certain vessels including barges and tank vessels that use state waters or ports must also document their financial ability to pay for oil spill removal costs, natural-resource damages, and related expenses. Depending on the type and size of vessel, and whether the vessel transports hazardous substances or oil, and whether it does so in bulk as cargo or as fuel for the vessel, the financial assurance that a vessel owner or operator must demonstrate to Ecology ranges from five hundred thousand dollars to one billion dollars. The hazardous substances subject to financial responsibility requirements are substances identified in a United States Environmental Protection Agency rule adopted in 2003.

Financial responsibility must be demonstrated to Ecology by providing evidence of insurance, surety bonds, qualification as a self-insurer, or other evidence of financial responsibility. The owner or operator of a vessel may also file a certificate with Ecology indicating compliance with federal or another states' financial responsibility demonstration requirements if those requirements require the same or greater financial responsibility to be demonstrated. Financial responsibility requirements do not apply to vessels or facilities owned or operated by the federal government, state government, or local governments, or to certain oil spill response barges.

Ecology has adopted rules to implement the financial assurance requirements applicable to certain vessels, but has not adopted rules to implement the financial assurance requirements applicable to facilities. The 2021-2023 Operating Budget included a proviso requiring Ecology to adopt financial assurance rules applicable to facilities.

Federal and Other State Oil Spill Financial Assurance Provisions.

Under the federal Oil Pollution Act of 1990, the United States Coast Guard administers a program that requires certain vessels and facilities that pose a substantial threat of oil discharge to obtain a certificate of financial responsibility after demonstrating the ability to meet a maximum amount of liability specified in federal law. Under state law, Ecology is authorized to enforce these federal financial responsibility requirements.

Other states, including California and Alaska, also require certain vessels and facilities to obtain certificates of financial responsibility after demonstrating the ability to pay specified amounts of damages in the event of an oil spill.

Summary of Engrossed Second Substitute Bill:

Certificates of Financial Responsibility.

The owner or operator of a vessel or facility required to document financial responsibility to the Department of Ecology (Ecology) must do so by obtaining a certificate of financial responsibility (COFR) from Ecology, or by relying upon an equivalent certificate issued by another state or the federal government. Ecology must adopt rules related to COFR requirements, including to specify the effective date for the requirement that vessels obtain a COFR. Ecology's rules implementing financial responsibility requirements for oil facilities and vessels must accord with the state's interest in issuing and managing COFRs in a manner that does not create or contribute to delays in commerce. A COFR:

- is a written acknowledgment by Ecology that the owner or operator of a facility or vessel, or the owner of the oil, has demonstrated to Ecology's satisfaction that the entity has a financial ability to pay for costs and damages caused by an oil spill;
- is conclusive evidence that the person holding it is the party responsible for a specified vessel, facility or oil for purposes of determining liability under state water pollution control laws;
- may not have a term greater than two years; and
- may cover multiple vessels or facilities owned or operated by the same person, in which case the terms of the COFR are based on the vessel or facility that represents the greatest financial risk in the event of a spill.

The holder of a COFR must notify Ecology of a spill in Washington waters, consistent with existing reporting obligations. The holder of a COFR must also notify Ecology of an oil spill in another jurisdiction's waters if the COFR holder may be liable and the spill may incur damages that exceed 15 percent of the resources reflected in the COFR. Upon notification, Ecology may reevaluate any COFR, and Ecology must reevaluate any COFR in

the event of a spill that may exceed 25 percent of the resources reflect of the COFR. Ecology may suspend or revoke a COFR if it determines that the COFR holder is likely to no longer have the financial resources to pay damages for the spill, discharge, or other liability and still have remaining resources sufficient to meet the financial responsibility demonstration requirements. If a COFR is suspended or revoked the owner or operator of the vessel or facility may receive a new COFR upon demonstrating an ability to meet the financial responsibility requirements in addition to paying all reasonably estimated anticipated damages arising from the spill. Ecology decisions related to a COFR are appealable to the Pollution Control Hearings Board.

Calculations of the Amount of Financial Responsibility Demonstrated by Oil Facilities.

Oil facilities must demonstrate to Ecology financial responsibility sufficient to compensate damages to affected federally recognized Indian tribes, in addition to the state, counties, and cities. Ecology must adopt a rule to calculate the damages that might occur from a reasonable worst-case spill from a facility by considering the worst-case amount of oil that could be spilled, as calculated in the applicant's oil spill contingency plan, in addition to the current criteria that Ecology must consider.

Other.

In order to maintain consistency with federal regulations, Ecology may update, by rule, the hazardous substances whose transport by vessel triggers financial responsibility demonstration requirements.

Certificates of deposit, letters of credit, and protection and indemnity club membership are added as acceptable options for vessels and facilities to demonstrate financial responsibility to Ecology. Ecology rules allowing self-insurance must require an applicant to thoroughly demonstrate the security of the applicant's financial position, and must be no less protective than the qualification standards for self-insurance in other jurisdictions. Ecology may require a self-insurer to demonstrate a greater monetary amount of financial responsibility than applicants relying on an alternative method of self-insurance.

Various technical corrections and clarifications are included.

A severability clause is included.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on March 9, 2022.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony (Environment & Energy):

(In support) Financial responsibility laws were first enacted decades ago, and the process of trying to modernize them began in the Legislature years ago. Oil transportation has gotten safer as a result of the state's new regulatory requirements added over the past decade, but oil financial responsibility program implementation has remained a high-priority unfunded program to reduce oil spill risks. The goal of financial responsibility laws is to ensure that companies responsible for oil vessels and facilities are able to pay for damages and cleanup costs in the event that a spill occurs. Oil spills inevitably happen because oil transportation is an inherently risky business. This bill will ensure that state and federal taxpayers do not have to bear the costs of a big oil spill when one occurs, and that spill recovery actions will not be slowed by a lack of available cleanup funds. A foreseeably large oil spill could result in costs and damages of hundreds of millions or billions of dollars. Volumes of oil arriving in Washington by ship, according to Ecology's quarterly reports, have been increasing significantly since late 2020, demonstrating the increasing likelihood of a spill. Self-insurance is not a viable form of financial responsibility because companies can shuffle assets through bankruptcies, mergers, and acquisitions. Other types of fossil fuel businesses, such as coal companies in recent years, have been able to evade environmental liabilities through the bankruptcy process. This proposal is a first step towards broader risk bonding requirements on companies involved in the fossil fuel supply chain that make them bear the externalized costs of their activities, including the costs of climate adaptation.

(Opposed) The bill increases regulatory complexity and costs for ship operators. Washington does not need a stand-alone program to ensure financial responsibility and has long relied on federal certificates of financial responsibility as sufficient. The shipping industry has operated safely and with few incidents without this program in place. The Department of Ecology (Ecology) does not have the staff or skills to manage a financial assurance certificate program. Establishing a state certificate program will create a regulatory patchwork where vessel operators need to obtain as many as three different certificates to operate on the West Coast. The California program upon which this proposal is based is challenging for vessel owners and operators, as certificates expire after a year, and government regulators do not always act on renewal applications in a timely manner. The reasonable per-barrel costs that oil facilities must demonstrate financial responsibility for should be given a more specific cost range.

(Other) Washington's oil spills program is widely considered to be the best in the nation. The option for facilities to self-insure to meet financial responsibility requirements should be assured. The proposed new standard basing financial responsibility demonstration amounts on a reasonable per-barrel cleanup cost should be amended to be less ambiguous, in order to facilitate obtaining financial products that would ensure satisfaction of that requirement. The director of Ecology should not have a blanket directive to revoke a facility or vessel's certificate in the event of the spill, which could lead to hasty decision-making based on perceptions. Instead, Ecology should re-examine financial information carefully in the event of a spill before deciding whether to revoke a certificate.

Staff Summary of Public Testimony (Appropriations):

(In support) The financial instruments in this bill would protect the public from expensive oil spills. Oil tankers carry a large amount of oil and make a lot of trips, and Washington has seen multiple oil spills. Loading and transportation of oil presents risks, and the financial responsibility should be put with the oil industry, where it belongs. Vessel traffic has increased, and studies that have modeled the impacts and costs of oil spills show that it could cost a lot. The bill would require vessel and facility owners to compensate tribes in addition to state and local governments. The amendment in the policy committee to allow self-insurance is concerning, because the state must be assured that oil vessels and facilities will cover the costs of a spill, and more financial health monitoring will be required.

(Opposed) Canceling coverage for vessels not directly associated with an oil spill could have devastating effects on the supply chain. The certification process in this bill is very intensive compared to the current policy for requiring vessels to have documentation of financial responsibility. The fiscal note estimates that the Department of Ecology (Ecology) will need two years for rulemaking, which creates a period of noncompliance after the bill goes into effect. Senate Bill 5747 is preferable to this bill.

(Other) The new Certificate of Financial Responsibility (COFR) would be applicable to an entire fleet, but would also be automatically revoked for an entire fleet due to a spill that is estimated to be worth more 5 five percent of the COFR. That 5 percent threshold should be changed to something closer to 50 percent. There is no obligation for the Director of Ecology (Director) to reevaluate a new submission for financial responsibility to get a fleet back online. There should be a time frame in which the Director is obliged to respond to an operator who was attempting to prove they had replaced their financial responsibility in the event of an oil spill.

Persons Testifying (Environment & Energy): (In support) Representative Mia Gregerson, prime sponsor; Laura Feinstein, Sightline Institute; John Talberth; Jase Brooks, Department of Ecology; Lovel Pratt, Friends of the San Juans; and David Perk, 350 Seattle.

(Opposed) Amber Carter, Columbia River Steamship Operators Association; and Peter Godlewski.

(Other) Tom Wolf, BP America; and Greg Hanon, Communico.

Persons Testifying (Appropriations): (In support) Laura Feinstein, Sightline Institute; Jamie Stephens, San Juan County; and Lovel Pratt, Friends of the San Juans.

(Opposed) Amber Carter, Columbia River Steamship Operators Association.

(Other) Brad Tower, Arrow Marine Services.

Persons Signed In To Testify But Not Testifying (Environment & Energy): None.

Persons Signed In To Testify But Not Testifying (Appropriations): None.